RECORD AND BRIEFS

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No. 16-32

In The

Supreme Court of the United States

KINDRED NURSING CENTERS LIMITED PARTNERSHIP, DBA WINCHESTER CENTRE FOR HEALTH AND REHABILITATION, NKA FOUNTAIN CIRCLE HEALTH AND REHABILITATION CENTER, et al.,

Petitioners,

v.

JANIS E. CLARK, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Kentucky

RESPONDENTS' BRIEF IN OPPOSITION

JAMES T. GILBERT
COY, GILBERT, SHEPHERD & WILSON
212 North Second Street
Richmond, KY 40475
(859) 623-3877

ROBERT E. SALYER
Counsel of Record
WILKES & MCHUGH, P.A.
429 North Broadway
P.O. Box 1747
Lexington, KY 40588
(859) 455-3356
rsalyer@wilkesmchugh.com

Counsel for Respondents

CUCKLE LEGAL BRIEFS (800) 225-6964
WWW.CUCKLELEGALBRIEFS.COM

QUESTION PRESENTED

A power of attorney is an Agency appointment. Under Kentucky law, the scope of an agent's authority depends upon the principal's intent. Here the Kentucky Supreme Court determined the intentions of two principals in their respective powers of attorney by interpreting the meaning of the language used in the instruments. Petitioners are in effect asserting that the FAA preempts the intention of a principal as determined by the Kentucky Supreme Court, regarding the scope of Agency authority conveyed upon the agent.

The question thus presented is:

Whether the Kentucky Supreme Court's routine application of interpretive principles to an instrument of Agency, *e.g.*, a power-of-attorney, is preempted by the Federal Arbitration Act.

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INTRODUCTION

In the case below, the Kentucky Supreme Court interpreted and construed the two powers of attorney at issue as not encompassing the authority for the agents to enter into pre-dispute arbitration agreements on behalf of their respective principals. The principals were nursing home residents of a single nursing home, and the agents were family members of the respective principal. The underlying disputes in their cases involve personal injury and allegations of nursing home abuse.

In one power of attorney, the Kentucky Supreme Court held that the plain language of the instrument did not encompass the authority. In the other power of attorney, the court held that the principal's intent to grant this authority could not be reasonably inferred from the language of the instrument.[1]

The lower court did not proscribe agent-made pre-dispute arbitration agreements. Rather, the Kentucky Supreme Court said this:

> Without any doubt, one may expressly grant to his attorney-in-fact the authority to bargain away his rights to access the courts and to trial by jury by entering into a pre-dispute

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[1] The question of intent is structurally a factual question; however, in Kentucky as with other jurisdictions, determination of the intent encompassed in a power of attorney is as a matter of law, and a matter for the courts. *Preston v. Henning*, 69 Ky. (6 Bush) 556 (Ky. 1869); *see also Clinton v. Hibbs' Executrix*, 259 S.W. 356, 357-358 (Ky. 1924) (question of principal's intent a matter for the court and not a jury).

> arbitration agreement. No one challenges that.

Pet. App. 43.

The lower court determined that the agents lacked sufficient authority to execute the arbitration contracts on behalf of the principals. This case therefore does not turn on any question of Contract law, except insofar as every contract requires party authority for its execution, and the Kentucky Supreme Court made this point abundantly clear as well:

> There is no dispute that if the arbitration agreements were validly formed, they are enforceable as written under both the Kentucky Uniform Arbitration Act (KUAA), KRS 417.050 et seq., and the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1 et seq., at least with respect to the decedents' claims for personal injury and statutory violations.

Pet. App. 24.

Any questions posed in this case subsist in Agency. Under Kentucky law, all powers of attorney are interpreted in accordance with "the age-old principle that a power of attorney must be strictly construed in conformity with the principal's purpose." Pet. App. 28. Moreover, under Kentucky law, the authority in a power of attorney derives from the intent of the principal. By default, in Kentucky a power of attorney confers no authority, until a court is satisfied from the principal's communication that the authority has been intentionally conferred. Whether a power of attorney

encompasses a particular transaction, a construing Kentucky court of law must gauge whether the reasonable reading of the grant of authority – as opposed to the broadest plausible reading – signifies the intention of the principal for such types of transaction to be consummated on the principal's behalf.

The Kentucky Supreme Court engaged in a routine application of interpretative principles to an instrument of Kentucky Agency in this case. The petition here seeks to involve this Court in power of attorney interpretation and construction, a task normally consigned to State law and State courts, and an area of law heretofore outside of the FAA's ambit. There is no split of opinion between the decision below and any U.S. Court of Appeals. There is no split of opinion between the decision below and any State court of last resort. As such, this Court should deny the petition for writ of certiorari.

STATEMENT OF THE CASE

I. Factual Background

Both cases involved in this petition stem out of allegations of nursing home abuse of a member of the Respondent's family (nursing home residents Joe Wellner and Olive Clark), committed by Petitioners and their nursing home facility, Winchester Centre for Health and Rehabilitation (n/k/a Fountain Circle Health and Rehabilitation Center). It was alleged, and was taken as fact by the Kentucky Supreme Court

below, that at the time of Joe Wellner and Olive Clark's admissions to Fountain Circle Health and Rehabilitation Center, the nursing home residents' respective attorneys-in-fact executed pre-dispute arbitration agreements on behalf of the resident, ostensibly pursuant to written powers of attorney. Pet. App. 6-7.

Joe P. Wellner was a resident of Fountain Circle Health and Rehabilitation Center from on or about August 16, 2008 until on or about June 15, 2009, dying on June 19, 2009. Respondent Beverly Wellner, on behalf of the Estate of her husband and on behalf of his wrongful death beneficiaries, alleged in a Complaint in the Circuit Court for Clark County, Kentucky, that at Petitioners' facility Joe Wellner sustained numerous injuries, including falls; dehydration and malnutrition; pressure sores; infections; improper wound care; severe pain; and death.

Olive Clark was a resident at this same Fountain Circle Health and Rehabilitation Center from on or about August 16, 2008 until on or about March 30, 2009, dying on April 4, 2009. While she was a resident in the Defendants' facility, it is alleged that Olive Clark also sustained numerous injuries, including falls; dehydration; skin breakdown; infections; medication errors; severe pain; and death. Respondent Janis Clark, on behalf of the Estate of her mother and on behalf of Olive's wrongful death beneficiaries, filed a Complaint against Petitioners in the Circuit Court for Clark County, Kentucky.

The written powers of attorney in question were short, one page affairs. The Wellner power of attorney provided in pertinent part:

> 1. To receive, take receipt for, and hold in possession, manage and control all property, both real and personal, which I now or may hereafter own, hold, possess or be or become entitled to with full power to sell, mortgage or pledge, assign, transfer, invest and reinvest the same or any part thereof in forms of investment, including bonds, notes and other obligations of the United States deemed prudent by my said son in his discretion, with full power to retain the same without liability for loss or depreciation thereof.
>
> 2. To demand, sue for, collect, recover and receive all debts, monies, interest and demands whatsoever now due or that may hereafter be or become due to me (including the right to institute legal proceedings therefor).
>
> 3. To make, execute, deliver and endorse notes, drafts, checks and order for the payment of money or other property from or to me or order in my name.
>
> 4. To make, execute and deliver deeds, releases, conveyances and contracts of every nature in relation to both real and personal property, including stocks, bonds, and insurance.

Pet. App. 21-23. The Clark power of attorney provided in pertinent part:

> I, OLIVE G. CLARK . . . hereby constitute and appoint . . . my true and lawful attorney in fact, with full power for me and in my name, place, and stead, in her sole discretion, to transact, handle, dispose of all matters affecting me and/or my estate in any possible way.
>
> Without limiting or derogating from this general power, I specifically authorize my attorney in fact for me and in my name, place, and stead, in her sole discretion:
>
> * * *
>
> To draw, make, and sign in my name any and all checks, promissory notes, contracts, deeds or agreements;
>
> * * *
>
> To institute or defend suits concerning my property or rights;
>
> * * *
>
> Generally to do and perform for me and in my name all that I might do if present.

Pet. App. 18-19.

When Joe Wellner and Olive Clark were admitted to Fountain Circle Health and Rehabilitation Center, their respective attorneys in fact executed on their behalf, not only admission contracts, but also separate arbitration agreements. Those arbitration agreements themselves "provided that all claims and controversies arising from the agreement or the resident's stay at the facility, including contract, tort, breach of statutory duties and other causes of action would be resolved under

the agreement." Pet. App. 57. These agreements were optional, *i.e.*, they were neither a condition of admission nor a condition for the provision of health care at Petitioners' facility. Pet. App. 17; 20.

II. Proceedings Below

Upon motions filed in each case to compel arbitration, the Clark County Circuit Court initially ordered enforcement. However, the Kentucky Supreme Court subsequently entered a decision in the case of *Donna Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581 (Ky. 2012), cert. denied, 133 S.Ct. 1996 (U.S. April 22, 2013), and Respondents moved for reconsideration.

In *Ping*, the Kentucky Supreme Court held that a power of attorney, which does not contain an authorization for dispute resolution, does not encompass the power to execute an arbitration agreement. *Ping*, 376 S.W.3d at 593-594. Additionally, *Ping* specifically quoted the RESTATEMENT (THIRD) OF AGENCY § 2.02 (comment h. (2006)), which teaches that there are "[t]hree types of acts [that] should lead a reasonable agent to believe that the principal does not intend to authorize the agent to do the act." *Ping*, 376 S.W.3d at 593. These acts by the agent "will impose on the principal" unforeseen "consequences" such that the authority to engage in those acts will not be inferred. *Id.*; Pet. App. 27-28; 122-124. One category of acts are those that "create legal consequences" "significant and separate" from the primary transactions, having "major legal implications for the principal, such as granting a

security interest in the principal's property or executing an instrument confessing judgment." *Ping*, 376 S.W.3d at 593; Pet. App. 28 n.10. "We would place in this third category of acts with significant legal consequences a collateral agreement to waive the principal's right to seek redress of grievances in a court of law." *Ping*, 376 S.W.3d at 593. "Nothing in Mrs. Duncan's power of attorney suggests her intent that Ms. Ping make such waivers on her behalf." *Id.*

Upon the precedent of *Ping*, the Clark County Circuit Court vacated its earlier orders compelling arbitration, substituting therefor orders denying the motions to compel arbitration. Pet. App. 126-127; 138-139. The case below is actually a consolidation by the Kentucky Supreme Court of three separate cases from the Kentucky Court of Appeals and the Clark and Trigg County Circuit Courts. A third set of parties in the lower courts, involving an unrelated nursing home and unrelated corporate defendant-appellants, have not joined in this petition.[2] *See* Pet. App. 29-38. In all three instances, the Circuit Court reached its decision premised upon absence of sufficient transactional authority in the respective power of attorney.

Petitioners filed motions for interlocutory relief in the Court of Appeals of Kentucky. Given the Kentucky Supreme Court's decision in *Ping v. Beverly Enterprises*, *see supra*, and the reliance of *Ping* upon the

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[2] This anomaly in the proceeding in front of this Court is one initial reason that this case does not represent the proper vehicle to resolve any issues arising in this case.

RESTATEMENT OF AGENCY, the Kentucky Court of Appeals denied relief. Pet. App. 121-125; 131-137.

Subsequent to the Kentucky Court of Appeals Orders denying relief, Petitioners appealed to the Kentucky Supreme Court. Not surprisingly, the Kentucky Supreme Court interpreted the three powers of attorney distinctively from one another, based upon their respective verbiage. Contrary to the impression perhaps left by Petitioners' petition, the Supreme Court of Kentucky did not interpret or construe any term in any arbitration agreement. Rather, the Kentucky Supreme Court's opinion is directed to interpreting the meaning and effect of words in powers of attorney.[3]

The Kentucky Supreme Court's reading of the Wellner power of attorney was straightforward. The Wellner power of attorney included language granting the attorney in fact some authority over Joe Wellner's legal affairs, and language granting the power to contract regarding property. The Kentucky Supreme Court concluded that this language did not plausibly encompass the power to execute the pre-dispute arbitration contract on behalf of the principal. The instrument language that included "the right to institute legal proceedings" to recover money was insufficient

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[3] Additionally, the lower court held (as it had in the past) that, pursuant to Kentucky's wrongful death statute, Ky. Rev. Stat. § 411.130, decedents do not have the authority to bind their wrongful death beneficiaries to arbitrate a wrongful death claim. Pet. App. 8-12. Under Ky. Rev. Stat. § 411.130 the decedent has neither a legal nor an equitable interest in the wrongful death claim.

because, self-evidently, executing a pre-dispute arbitration agreement is not itself the institution of a legal proceeding. Pet. App. 35-36. And while a chose-in-action is property under Kentucky law, the arbitration agreement was at its most fundamental an exchange involving the parties' rights, rather than an exchange with reference to their property. It would be objectively implausible to characterize the execution of a pre-dispute arbitration agreement as a property transaction. Pet. App. 36-38.

The Kentucky Supreme Court determined that the Clark power of attorney did plausibly encompass the power to execute the pre-dispute arbitration contract on behalf of the principal, given the instrument's broad language. The instrument language grants the attorney-in-fact power "to do and perform for me and in my name all that I might do if present," as well as granting general authority to execute contracts. Nonetheless, the Kentucky Supreme Court determined that it was not objectively reasonable to interpret the Clark instrument language as including the Agency power to execute pre-dispute arbitration contracts on behalf of the principal. Pet. App. 38-39. The Supreme Court took the position that the meaning of a Kentucky power of attorney is not determined by the broadest inferences that can be drawn from its words; rather, a Kentucky power of attorney's meaning derives from the readable intentions of the principal. Pet. App. 39. A universal but generally-worded grant of Agency was insufficient to demonstrate that the principal had manifested the

intention for the attorney in fact to have the power in question.

The Kentucky Supreme Court considered the Kentucky Constitution's characterization of the right to trial to inform the principal's reasonable expectations of language in Kentucky instruments. Pet. App. 41-43. The Kentucky citizen-principal, being master over his or her own legal affairs, does not evince an intention for an agent to have the ability to take that principal out of the legal system vis-à-vis another party, in an irrevocable and unbreakable perpetual agreement, unless the principal specifically grants the agent this power. *See* Pet. App. 43.

There were two Dissenting Opinions. Justice Abramson wrote one Dissent, joined by Chief Justice Minton and Justice Noble. Justice Abramson had authored the *Ping* Opinion, and she attempted to distinguish its circumstances from those of Wellner and Clark. *See* Pet. App. 84.

Justice Noble additionally also wrote a Dissent, joined by Chief Justice Minton. She wrote separately to point out what she considered to be a general error in the Kentucky Supreme Court's power of attorney jurisprudence. She contended that the Kentucky Supreme Court was in effect erroneously converting general powers of attorney into specific powers of attorney by limiting general powers of attorney to the illustrative powers recited in the instrument. Pet. App. 109; 111-112.

REASONS FOR DENYING THE PETITION

I. There Is No Split Of Opinion Below.

Again, there is no split of opinion between the decision below and any U.S. Court of Appeals or other State supreme court regarding any issue addressed by the lower court here. Only one U.S. District Court has addressed this issue and the lower court's decision. Even as the U.S. District Court for the Western District of Kentucky has chosen not to follow the State Supreme Court's holding on the proper interpretation of Kentucky powers of attorney, the U.S. Court of Appeals for the Sixth Circuit has yet to address the issue.

Most of the U.S. District Court cases from the Western District of Kentucky cited by Petitioners have been appealed to the Sixth Circuit. *See, e.g.*, *Brandenburg Health Facilities, LP v. Mattingly*, No. 3:15-cv-00833 (W.D. Ky. 2016), *appeal docketed*, No. 16-6168 (6th Cir. Jul. 19, 2016); *Preferred Care of Delaware, Inc. v. Hopkins*, No. 5:15-cv-00191 (W.D. Ky. 2016), *appeal docketed*, No. 16-6180 (6th Cir. Jul. 22, 2016); *GGNSC Louisville Mt. Holly, LLC, et al. v. Leslie Guess Mohamed-Vall*, No. 3:16-cv-00136 (W.D. Ky. 2016), *appeal docketed*, No. 16-5606 (6th Cir. May. 5, 2016). The Sixth Circuit will have appellate jurisdiction to hear these interlocutory appeals, at the very least inasmuch as the U.S. District Court orders also include injunctive relief. Injunctive relief entitles those appellants to an appeal as of right regarding the injunction, 28 U.S.C. § 1292, and the Sixth Circuit will necessarily have pendent jurisdiction over the arbitration agreement

decisions upon which the injunctions are based. Given that the Sixth Circuit has not yet addressed the asserted issues raised by Petitioners here, but is poised to do so, a writ of certiorari would be premature at this juncture.

In a footnote, Petitioners cite to two out-of-state cases where courts have purportedly interpreted powers of attorney differently from the interpretation given Kentucky powers of attorney by the lower court. These cases do not signify a split however. In *Myers v. GGNSC Holdings, LLC*, 2013 WL 1913557 (N.D. Miss. May 8, 2013), the U.S. District Court assumed, without the benefit of opposition from the party who might be expected to oppose arbitration, that a broadly-worded general power of attorney permitted the attorney in fact to execute an arbitration agreement on behalf of a principal. Notably, the federal court decided this issue only in the alternative, after concluding that a third party beneficiary theory would apply to bind the principal to a mandatory-for-services arbitration agreement. Furthermore, the federal court decided the issue by apparent application of Mississippi law on powers of attorney – not pursuant to any requirement of the FAA. Likewise, in *Estate of Smith v. Southland Suites of Ormond Beach, LLC*, 28 So.3d 103 (Fla. Dist. Ct. App. 2010) (per curiam), the Florida intermediate court decided the scope of the power of attorney at issue by application of Florida law, not pursuant to an application of a requirement from the FAA. Neither case represents a disagreement, much less a conflict, with the lower court here.

II. The Kentucky Supreme Court's Decision Does Not Implicate The FAA Or Trigger Federal Preemption.

Title 9 U.S.C. § 2 preserves intact contract defenses that pertain to the formation of an arbitration agreement. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 354-355 (2011) (Thomas, J., concurring) (reading 9 U.S.C. § 4 to explain the subset of contract defenses available under 9 U.S.C. § 2, and contrasting formation defenses, from those defenses that pertain to the revocation or enforceability of an agreement). Where a party's agent lacks authority to execute the arbitration agreement, no contract is ever formed. The FAA does not preempt the defense that no one with proper authority executed the arbitration agreement. Similarly, the FAA does not preempt a State judicial determination regarding the scope of an agent's authority.

There is a difference between a defense to the formation of a contract, the success at which triggers revocation of the contract, and no formation of a contract at all. The FAA does not trigger any substantive right pursuant to an agreement to arbitrate, independently of the existence of such an agreement. Therefore, the lower court's decision here does not trigger FAA analysis. There was no contract for arbitration.

The federal policy flowing from the agreement to arbitrate exists to place such agreements on the same footing as other contracts, *Granite Rock Co. v. International Broth. of Teamsters*, 561 U.S. 287, 302 (2010),

and any limitations upon contract defenses found in 9 U.S.C. § 2 are one aspect of this federal policy favoring arbitration. *Granite Rock Co.*, 561 U.S. at 302. However, whether an agreement to arbitrate ever existed (*i.e.*, whether there ever existed a meeting of the minds of the parties for an exchange of value) is a condition precedent before the rubrics of the FAA are triggered. *See id.* (policy considerations favoring arbitration flow from and are dependent upon an agreement to arbitrate); *see also Gateway Coal Co. v. United Mine Workers of America*, 414 U.S. 368, 374 (1974) (obligations arising under the FAA exist by virtue of a party's contract for arbitration, and not by operation of law). The due regard for the federal policy favoring arbitration and the threat of federal preemption only arises upon presentation of a prima facie contract. *See Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 475-476 (1989) (the due regard for the federal policy favoring arbitration applies to contract interpretation, and to questions of scope).

Ordinary State Contract law principles govern the formation of agreements to arbitrate. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (whether an agreement on arbitration was reached is a question answered by application of "ordinary state-law principles that govern the formation of contracts"). Whether a putative agreement to arbitrate exists is a question distinguishable from any dispute regarding the validity of formation, or enforceability of the contract. *See Buckeye Check Cashing, Inc. v. Cardegna*, 546

U.S. 440, 444 n.1 (2006) (distinguishing the question of whether an arbitration agreement was "ever concluded," from the question of whether the agreement was void ab initio due to illegality).

As such, there is a two tier process in approaching an alleged arbitration agreement. Questions of whether a contract is fatally flawed, rendering it either void or unenforceable, are second tier queries. They are answered subject to application of the FAA.

However, the question of whether a prima facie agreement ever existed at all, *i.e.*, whether there occurred a meeting of the minds for an exchange of value, is a first tier question. It is answered prior to triggering the FAA. In *Buckeye Check Cashing*, this Court stated that a challenge "'upon such grounds as exist at law or in equity for the revocation of any contract'" refers to a challenge to the validity of the arbitration agreement, or to the validity of a larger contract in which an arbitration clause is ensconced. *Buckeye Check Cashing, Inc.*, 546 U.S. at 444. The Court went on to make a colorable distinction between a dispute regarding an arbitration agreement's validity, and one where there is a dispute as to whether an agreement was "ever concluded." *See Buckeye Check Cashing, Inc.*, 546 U.S. at 444 n.1.

Buckeye Check Cashing, Inc. recites a number of examples of such threshold disputes: Did the alleged obligor sign the contract? *Id.* (*citing Chastain v. Robinson-Humphrey Co.*, 957 F.2d 851 (11th Cir. 1992)). Did the signing obligor lack mental capacity to

assent? *Id.* (*citing Spahr v. Secco*, 330 F.3d 1266 (10th Cir. 2003)). Did the signor ***lack authority to bind the obligor***? *Id.* (*citing Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99 (3d Cir. 2000) and *Sphere Drake Ins. Ltd. v. All American Ins. Co.*, 256 F.3d 587 (7th Cir. 2001)). Logically, before there is any calculus as to whether there exists "such grounds as exist at law or in equity for the revocation of any contract," *i.e.*, a challenge to the contract's validity and one subject to the FAA; there must be a prima facie case that the contract was in fact "ever concluded." Here, the lower court's decision operates to find that a contract was never concluded, and the FAA is thus not triggered.

> Consequently, the disputes before us are not about the ***enforcement*** of validly formed arbitration agreements covered by the KUAC [sic] and the FAA. Rather, the disputes are about the ***formation*** of the arbitration agreements; and specifically, whether the agent purporting to sign the arbitration agreement on behalf of his principal had the authority to do so.

Pet. App. 24 (emphasis in the original).

The decision below does not implicate the FAA. It involves solely a question of the State law on the scope of Agency authority, and this Court should therefore deny the petition for certiorari. *See Michigan v. Long*, 463 U.S. 1032, 1037-1044 (1983) (where the judgment of a State court rests on adequate and independent State grounds, the U.S. Supreme Court lacks jurisdiction to review the case, inasmuch as such a review

would only constitute an advisory opinion on federal law).

III. The Kentucky Supreme Court Interpreted The Powers Of Attorney In This Case According To Reasonable And Arbitration-Neutral Canons of Agency Interpretation.

The essential nature of the decision below subsists as an exercise in applying State Agency law and determining an Agency relationship. The Kentucky Supreme Court did not examine or interpret the arbitration agreements, neither as a whole nor in their terms, to arrive at that court's decision. If the Kentucky Supreme Court had found sufficient Agency, there is no reason to believe that that court would not have enforced the arbitration agreements. *See* Pet. App. 24; *see also Schnuerle v. Insight Communications Company, L.P.*, 376 S.W.3d 561 (Ky. 2012) (enforcing arbitration agreement in context of consumer internet service agreement); *Hathaway v. Eckerle*, 336 S.W.3d 83 (Ky. 2011) (enforcing arbitration agreement in context of automobile purchaser's dispute with auto dealership). Justice Noble's Dissent strongly suggests that at root the split in the lower court was not actually directed toward the reach of the FAA at all, but to the proper interpretation and construction of Kentucky powers of attorney. *See* Pet. App. 105-107.

A. The Kentucky Supreme Court Interpreted The Wellner Power Of Attorney Literally According To Its Language.

Notably, Petitioners' Question Presented does not properly pertain to the Wellner power of attorney or the lower court's interpretation thereof. That the Wellner instrument failed to include an express provision regarding arbitration is not the basis of the lower court's holding regarding the Wellner power of attorney. Rather, the lower court concluded that the black letter of the language in the Wellner power of attorney did not plausibly encompass the power to execute a pre-dispute arbitration agreement.

While the power granted to the Wellner agent to "institute legal proceedings" necessarily encompasses some discretion in exercising this power, it in no way implies that the agent had the authority to promise a third party to never exercise one of the powers actually granted, *e.g.*, the power to sue in a court of law. Fundamentally, the arbitration agreement was the pre-dispute waiver of one route of dispute resolution; it did not represent the institution of anything.

> Kindred acknowledges that this provision of the Wellner POA granting the power to "demand, sue for, collect, recover and receive all . . . demands whatsoever" and "to institute legal proceedings" did not expressly authorize Beverly to sign the pre-dispute arbitration agreement. Instead, Kindred argues that such authorization must be implied because arbitration is "reasonably necessary or

> incidental," as Kindred puts it, to "the ability to settle suits that have been brought pursuant to Joe's intended grant of authority." Kindred argues, "it would be an absurd result to recognize an agent's power to bring suit . . . and then deny that she has the power to settle those very claims." We do not disagree; but "arbitrating" is not "settling."

Pet. App. 35.

The Wellner power of attorney language regarding property contracts was likewise facially insufficient. A chose-in-action under Kentucky law is indeed personal property, but it would be at best unvested property in this circumstance. Moreover, a pre-dispute arbitration agreement is a contract fundamentally pertaining to a right. It is not the buying, selling, or leasing of any kind of property. No lay principal would understand it as a property transaction. Pet. App. 36-38. In sum, the interpretation of the Wellner power of attorney fell under its black letter, and Petitioners' Question Presented does not apply to it.

B. The Kentucky Supreme Court Interpreted The Clark Power Of Attorney According To The Revealed Intent Of The Principal, As Understood From The Standpoint Of The Reasonable Expectations Flowing From Language Used In Kentucky.

Here, the Kentucky Supreme Court held that the Clark power of attorney did not include the power to

execute the pre-dispute arbitration contract. It came to this conclusion by determining the intent manifested by the principal, given what that principal should reasonably see as flowing from the language used. *Cf. Wright v. Universal Maritime Service Corp.*, 525 U.S. 70, 79-80 (1998) (arbitration requirement in collective bargaining agreement must be particularly clear).

Under Kentucky law, powers of attorney are strictly construed, *Harding v. Kentucky River Hardwood Co.*, 265 S.W. 429 (Ky. 1924), giving effect only to the purposes of the principal. *See Clinton v. Hibbs' Executrix*, 259 S.W. 356, 357-358 (Ky. 1924) (agent's authority to conduct all business and execute all notes, at the agent's discretion, held not to encompass the power to bind the principal as surety). Under Kentucky law "[a]ctual authority arises from a direct, ***intentional*** granting of specific authority from a principal to an agent." *Kindred Healthcare, Inc. v. Henson*, 481 S.W.3d 825, 830 (Ky. Ct. App. 2014) (*citing Mills Street Church of Christ v. Hogan*, 785 S.W.2d 263, 267 (Ky. Ct. App. 1990)) (emphasis added). The principal's discrimination against ***all*** powers of Agency is to be inferred by Kentucky courts, until those courts are satisfied that the inference has been overcome by the principal's communication. *See Mill Street Church of Christ v. Hogan*, 785 SW2d at 267 (burden to establish Agency is upon the proponent thereof). Given these arbitration-neutral principles, in determining whether a power of attorney authorizes a particular transaction, a construing Kentucky court of law must gauge whether the reasonable reading of the instrument signifies the

intent of the principal that such types of transaction be consummated on the principal's behalf.

The Kentucky Supreme Court's decision in this case, as in that of *Ping v. Beverly Enterprise* before it, took into account the reasoning from the RESTATEMENT (THIRD) OF AGENCY § 2.02 (comment h. (2006)). Notably, while the Restatement speaks to the significance of unforeseen consequences stemming from literally reading a broad power of attorney, it does not speak of these consequences as necessarily negative. For example, granting a security interest in a principal's property, *e.g.*, to secure a loan benefiting the principal, may be a common and desirable action taken by an attorney in fact. Nonetheless, it is a significant transaction potentially unforeseen by the principal, and must be set out explicitly in the power of attorney, according to the Common Law. *Cf. Clinton v. Hibbs' Executrix*, *supra* (agent empowered to conduct all business and execute all notes, at the agent's discretion, does not encompass the power to bind the principal as surety without language to this effect). Such a requirement of expression does not evince judicial hostility to securing transactions. Similarly, requiring explicit mention of the power to execute pre-dispute arbitration agreements does not signify judicial hostility toward arbitration.

Nonetheless, Petitioners contend that the lower court discriminated against arbitration, pointing to the following language:

> It would be strange, indeed, if we were to infer, for example, that an attorney-in-fact with the

> authority "to do and perform for me in my name all that I might if present to make any contracts or agreements that I might make if present" could enter into an agreement to waive the principal's civil rights; or the principal's right to worship freely; or enter into an agreement to terminate the principal's parental rights; put her child up for adoption; consent to abort a pregnancy; consent to an arranged marriage; or bind the principal to personal servitude. It would, of course, be absurd to infer such audacious powers from a non-specific, general, even universal, grant of authority.

Pet. App. 42.

Petitioners claim, as does the Dissent below, that this list constitutes a "parade of horribles" into which the lower court lumped arbitration, inasmuch as each of these exemplars indicates an extreme, and arguably distasteful, transaction taken on behalf of a principal. Petitioners and the Dissent misconstrue the purpose of the listing however.

The lower court used this hyperbolic list to prove a point, not to make a comparison. The point is that, even though all of these transactions are literally covered by language giving the agent the right to step in the shoes of the principal, no court is going to nonchalantly assume that the agent was granted the authority to put the principal's child up for adoption, without specifically-tailored language in the power of attorney to that effect.

That is, a principal certainly could put a child up for adoption in person. This may be viewed as an unfortunate transaction, but the fact that such a transaction is consummated by an agent does not make the transaction itself any better or worse in character. It does make the transaction fatally suspect however, if the agent held only a general, albeit broad catch-all, power of attorney. That the Kentucky Supreme Court reads limitations into even the most general and universal of powers of attorney is a practice that preceded that court's line of arbitration cases. *See* Pet. App. 43-44 (lower court *citing Rice v. Floyd*, 768 S.W.2d 57, 59 (Ky. 1989) for this proposition).[4] Despite a grant of compete proxy power, the Kentucky Supreme Court is still going to recognize a back-stop of what can be reasonably inferred from a universal but non-specific grant of authority.

Petitioners claim, as does the Dissent below, that the lower court's allusion to the Kentucky Constitution signifies an elevation of the right to civil trial to a sacrosanct status.

> [T]he right of trial by jury, . . . incidentally is the only thing that our Constitution commands us to "hold sacred." See Ky. Const. § 7 ("The ancient mode of trial by jury shall be

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[4] In *Rice v. Floyd*, the Kentucky Supreme Court announced that even the broadest power of attorney would not have all the authority that a guardian might have. *Rice v. Floyd*, 768 S.W.2d at 59 ("The scope of authority, duties and accountability of a guardian is much broader than that of a traditional power of attorney, even one intended to survive disability.").

> held sacred, and the right thereof remain inviolate, subject to such modifications as may be authorized by this Constitution.").

Pet. App. 41.

Petitioners and the Dissent claim that, by virtue of this purported elevation in status, the Kentucky Supreme Court required specific Agency power to waive a principal's trial rights via the pre-dispute arbitration agreement. Not so. The lower court made clear that it was not purposing to craft an Agency rule to protect trial rights per se; rather, the lower court held that it deemed the Kentucky Constitution to inform principals as to what is reasonably foreseeable in Kentucky instruments, thereby providing a key to determining the meaning expressed in a power of attorney.

> [I]t would be absurd ***to infer*** from a non-specific, universal grant, the principal's ***assent*** to surrender of other fundamental, even sacred, liberties.

Pet. App. 42 (emphasis altered).

That the Kentucky Supreme Court chose to deem the Kentucky principal to be informed by the State Constitution's characterizations – as opposed to being informed by ubiquitous arbitration clauses in the fine print of consumer contracts which consumers do not have a hand in drafting and often never notice – does not constitute an incident of discrimination against arbitration.[5] The Kentucky Supreme Court's holding

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[5] Interestingly, the Wellner and Clark arbitration agreements are facially governed by the Kentucky Uniform Arbitration Act.

explicitly affirms that pre-dispute nursing home arbitration agreements are enforceable, and can be executed by properly empowered agents. In sum, this Court should not review this case because it involves solely a reasonable interpretation of a Kentucky power of attorney, and does not burden the execution of arbitration agreements.

IV. The Decision Below Is Consistent With This Court's Precedent.

Petitioners rely upon *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), to argue that State law contract defenses are preempted by the FAA in the event that the defenses "derive their meaning from the fact that an agreement to arbitrate is at issue." *Id.* at 333 (*citing Doctor's Associates, Inc. v. Casarotto, see infra*). *Concepcion* stands for the proposition that even arbitration-neutral State Contract law is preempted if it has the effect of undermining the efficacy of entering into arbitration agreements. In *Concepcion*, an arbitration clause in a consumer contract in California included a class action waiver. Yet, California law prohibited just such waivers in the context of consumer

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Pet. App. 24. However, because of a jurisdictional anomaly in the agreements potentially interfering with the KUAA's application, the FAA was held to govern the agreements. *See* Pet. App. 63. Petitioners' position must implicitly be then that a Kentucky power of attorney could mean one thing in a FAA context (applying federal preemption), and another in an intra-State KUAA context (no federal preemption). Such a result is self-evidently problematic. A grant of Agency should be interpreted uniformly and objectively, faithful to the mandate of the principal.

contracts of adhesion, and, as such, the U.S. Court of Appeals for the Ninth Circuit found the arbitration clause unconscionable and unenforceable under California law (following the California Supreme Court's holding enunciated in *Discover Bank v. Superior Court*, 113 P.3d 1100 (2005)). The Ninth Circuit reasoned that the California rule against class action waivers did not single out arbitration contracts as such for disparate treatment, as the rule applied equally to contracts barring class action in the context of in-court litigation.

This Court reversed, holding that even such a facially neutral State law rule, given that it would have a disproportionate impact on arbitration, is preempted by the FAA. The FAA encourages the use of arbitration for dispute resolution, and the benefit of arbitration for the parties in consumer transactions is the relative speed, cost, and efficiency of arbitration. Class actions negate much of the advantages in speed, cost, and efficiency. Thus, because the benefits of arbitration would be absent without a class action waiver, California's refusal to enforce class action waivers had the effect of removing an entire class of dispute from the ambit of arbitration. That rule was preempted.

Concepcion is distinguishable from the circumstance here. First and most obviously, *Concepcion* is not a case involving the ***formation*** of an arbitration contract. There was no question that an agreement had been reached in *Concepcion*, and it was an agreement that included a class action waiver. As the Concurring Opinion in *Concepcion* pointed out:

> Reading §§ 2 and 4 [from the FAA] harmoniously, the "grounds . . . for the revocation" preserved in § 2 would mean grounds related to the making of the agreement. This would require enforcement of an agreement to arbitrate unless a party successfully asserts a defense concerning the formation of the agreement to arbitrate, such as fraud, duress, or mutual mistake.

AT&T Mobility LLC v. Concepcion, 563 U.S. at 355 (Thomas, J., concurring). "Under this reading, the question here would be whether California's *Discover Bank* rule relates to the making of an agreement. I think it does not." *Id.* at 356. Here, the issue is unequivocally related to "the making of an agreement." *Concepcion* thus is distinguishable.

Additionally, *Concepcion*'s concern for a disproportionate impact was directed at a State rule that negated the advantages of arbitration, making arbitration effectively worthless as an alternative to litigation. This is not the effect of the lower court's decision here. No advantage of the arbitral method is affected.

Finally, the practical effect of the *Discover Bank* rule in California was to render many agreements to arbitrate unenforceable, even though both parties had agreed to arbitration. In contrast, in the case below, the Kentucky Supreme Court made clear that a sufficient grant of authority to enter into such an agreement would yield a valid contract. The holding of *Concepcion* simply has no application to the lower court's decision.

Petitioners also cite to *Doctor's Associates v. Casarotto*, 517 U.S. 681 (1996), for support. In that case, this Court was faced with a Montana statute mandating that arbitration clauses in contracts had to be conspicuous and in a different font than the rest of the contract. This Court held that such a highlighting of the arbitration clause impermissibly ostracizes this clause from all the other clauses in the contract, and is preempted by the FAA.

Petitioners' citation to *Casarotto* overlooks key differences between the cases: The Montana statute placed an encumbrance upon arbitration agreements themselves. Here there is no requirement placed on the agreements; the lower court's decision only affects entirely separate, independent instruments of Agency. The Montana statute required that the subject matter be highlighted, thereby ostracizing it as different than other types of provisions in a contract. Here, the only requirement is that the subject matter simply appear in the instrument of Agency authority, which in no way implies that an agreement to arbitrate is a suspect transaction. *Casarotto* is thus distinguishable.

The case of *Marmet Health Care Center, Inc. v. Brown*, 132 S.Ct. 1201 (2012), is even more clearly inapplicable to this case. In *Marmet* this Court reversed a West Virginia Supreme Court decision which held that the FAA did not apply, at all, to personal injury or wrongful death claims and that arbitration agreements pertaining to those claims would not be enforced. The West Virginia Supreme Court came to this conclusion based upon its own esoteric reading of the

statutory history of the FAA. The Kentucky Supreme Court did not, nor did it have any reason to, analyze the statutory history of the FAA, nor did the Kentucky Supreme Court exclude any class of dispute from being subject to pre-dispute arbitration agreements. *Marmet* has no application.

Petitioners ask that the lower court's decision be vacated and remanded for further consideration in light of *DIRECTV, Inc. v. Imburgia*, 136 S.Ct. 463 (2016). However, the Kentucky Supreme Court has already considered the impact of *DIRECTV* in this case. Subsequent to the lower court's decision, Petitioner below filed a motion for rehearing. Petitioners filed a motion to supplement the authority for rehearing, to add and cite to *DIRECTV*. (App., *infra*, 1a-6a) Petitioners included argument as to *DIRECTV*'s applicability to this case in their motion to supplement. The Kentucky Supreme Court granted the motion to supplement prior to ruling on the motion for rehearing (App., *infra*, 7a), and therefore has already taken *DIRECTV* into account.

Additionally, *DIRECTV* is facially distinguishable from the circumstances presented in the lower court's decision. In *DIRECTV v. Imburgia*, the defendant media corporation provided a form contract to its California consumers, one that included an arbitration clause excluding class action arbitration. The clause was conditioned on the availability, *i.e.*, the continued viability, of the class action waiver. If local law refused to enforce the class action waiver, then the arbitration clause itself would be rendered unenforceable, per the terms of

the contract. Post-*AT&T v. Concepcion*, the condition for revoking the arbitration clause could only be triggered if the lower court imported obsolete law (California's *Discover Bank* rule) into the contract. This the California appellate court did, holding that the arbitration clause was unenforceable because the law at the time of the contract's inception prohibited the class action waiver.

Given that the evinced intent of the contracting *DIRECTV* parties was to enter into an arbitration agreement, and given that their evinced intent was also to exclude class action arbitration; normal contract construction would have been to opt for the importation of valid law to effect the contract. This Court thus recognized that the California appellate court had deliberately misapplied California Contract law, out of apparent animus against arbitration. This Court reversed and remanded to the lower California court.

Contract law favors the enforcement of contracts made. There is no such analogous preference in the interpretation of Agency. Agency determinations are an unbiased endeavor to determine the intent of the principal, without regard to the promotion of a particular, publicly-favored transaction. *DIRECTV*, along with the other cases cited in the petition, have no application to the lower court's decision, and the lower court's decision is fully consistent with this Court's binding precedents.

V. That This Case Comes Out Of The Kentucky Supreme Court, Rather Than The U.S. Court Of Appeals For The Sixth Circuit, Makes This Case A Poor Vehicle For Review Of The Requirements Of The FAA.

Petitioners claim that the FAA can preempt State law regarding the interpretation of powers of attorney. Even if this claim is true, this case constitutes a poor vehicle to dispose of this issue.

The fact that this Court is not unanimous on whether the FAA should apply in State court means that a factor outside of Petitioners' claim may be decisive in the result. In *Southland Corp. v. Keating*, 465 U.S. 1 (1984), this Court concluded that section 2 of the FAA applies equally in State court actions, and thus preempts State courts from applying inconsistent standards, over the dissent of Justice O'Connor, joined by Justice Rehnquist. *See id.* at 21. Justice O'Connor eventually accepted the stare decisis effect of *Keating* in *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 283-284 (1995) (O'Connor, J., concurring), even while "continu[ing] to believe that Congress never intended the Federal Arbitration Act to apply in state courts, and that this Court has strayed far afield in giving the Act so broad a compass." *Id.* at 283. But in *Allied-Bruce*, two more Justices took up the view "that *Southland* clearly misconstrued the Federal Arbitration Act," *id.* at 284 (Scalia, J., dissenting), and that the FAA is "wholly inapplicable in [State] courts." *Id.* at 297 (Thomas, J., dissenting).

In *DIRECTV, Inc. v. Imburgia*, 136 S.Ct. 463 (2015), Justice Thomas made clear that he "remain[s] of the view that the Federal Arbitration Act . . . does not apply to proceedings in state courts" and "does not require state courts to order arbitration." *Id.* at 471 (Thomas, J., dissenting). The continuing disagreement on the Court over this question makes a case coming from a State court a poor candidate for resolving any issue involving the substance of the FAA. This is so because such issues have often closely divided the Court. *See, e.g., American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304 (2013); *Concepcion*, 563 U.S. 333; *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010). *Concepcion* was decided by a five justice majority. The origin of this case in the State court system makes it a very poor candidate for review.

VI. Interpreting State Agency Law In Deference To A Federal Statutory Scheme Would Have Unforeseen Negative Ramifications.

Determination of the intent of a principal in Agency is necessarily a task committed to the judiciary.[6] At the end of the day, some court is going to have the final say as to what Joe Wellner and Oliver Clark

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[6] It is interesting to note however, the Louisiana Civil Code, La. Civ. Code art. 2997, provides that an express power in a power of attorney (called a "mandate" in Louisiana law) is required for the agent to have the authority to refer a matter to arbitration on behalf of the principal. Presumably Petitioners would take the position that this Louisiana statute would be preempted as well.

meant in their respective powers of attorney. That court should be the court of last resort in Kentucky. This Court should not wish to take on a role in interpreting Agency relationships in the United States. Issuing a writ of certiorari in this case would open up this Court's doors to parties seeking alternative interpretations of powers of attorney whenever a federal statutory scheme can be implicated and whenever those parties are dissatisfied with a State court interpretation.[7] This petition threatens to federalize a huge area of State law.

Finally, "the FAA imposes certain rules of fundamental importance, including the basic precept that arbitration 'is a matter of consent, not coercion.'" *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. at 664 (quoting *Volt v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. at 479). This precept is precisely what the lower court's decision safeguards. Because the Kentucky Supreme Court could not establish with certainty the principals' intent to grant their agents the power to execute these agreements, that court narrowly construed the documents, as that Court was required to do under Kentucky law.

Normally a party presented a power of attorney to establish an agent's authority over another party's

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[7] Moreover, upon issuing a writ in this case, this Court may henceforth be called upon to determine other questions related to arbitration agreements, *e.g.*, whether, in light of the public policy favoring arbitration, a principal had sufficient capacity to enter into the agreement.

business prefers ***more*** explicit language in the power of attorney rather than ***less***. . . . For instance, in applying for a mortgage, banks typically require a very specific and detailed power of attorney before the bank will act on an application via attorney in fact. As such, the preference of Petitioners and Amici for less explicit language speaks to their eagerness for nursing home residents to enter into these, practically unbreakable, arbitration agreements at all costs . . . perhaps inadvertently. Amici apparently justify this result as an outcome expedient for the financial well being of the nursing home industry. However, this would be a wholly illegitimate means to that end. While the FAA sets forth a national policy of favoring arbitration, presumably its aim is not to facilitate mistaken transactions. Any other conclusion would have due process implications, potentially converting the routine interpretation of a power of attorney by a State court into a Constitutional case.

CONCLUSION

The petition for a writ of certiorari to the Supreme Court of Kentucky should be denied.

Respectfully submitted,

ROBERT E. SALYER
Counsel of Record
WILKES & MCHUGH, P.A.
429 North Broadway
P.O. Box 1747
Lexington, KY 40588
(859) 455-3356
rsalyer@wilkesmchugh.com

JAMES T. GILBERT
COY, GILBERT, SHEPHERD & WILSON
212 North Second Street
Richmond, KY 40475
(859) 623-3877

Counsel for Respondents

SEPTEMBER 2016

COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2013-SC-000431-I

KINDRED NURSING CENTERS LIMITED PARTNERSHIP d/b/a WINCHESTER CENTRE FOR HEALTH AND REHABILITATION n/k/a FOUNTAIN CIRCLE HEALTH AND REHABILITATION; KINDRED NURSING CENTERS EAST, LLC; KINDRED HOSPITALS LIMITED PARTNERSHIP; KINDRED HEALTHCARE, INC.; KINDRED HEALTHCARE OPERATING, INC.; KINDRED REHAB SERVICES, INC. d/b/a PEOPLEFIRST REHABILITATION — MOVANTS/PETITIONERS

v.

ON REVIEW FROM
COURT OF APPEALS
CASE NO: 2012-CA-002212-I

BEVERLY WELLNER, Individually and on behalf of the Estate of JOE P. WELLNER, deceased, and on behalf of the wrongful death beneficiaries of JOE P. WELLNER — RESPONDENT/RESPONDENT

MOVANTS' MOTION FOR LEAVE TO CITE SUPPLEMENTAL AUTHORITY

Movants/Petitioners, Kindred Nursing Centers Limited Partnership d/b/a Winchester Centre for Health and Rehabilitation n/k/a Fountain Circle Health and Rehabilitation; Kindred Nursing Centers East, LLC; Kindred Hospitals Limited Partnership; Kindred Healthcare, Inc.; and Kindred Healthcare Operating, Inc. and Kindred Rehab Services, Inc. d/b/a Peoplefirst

Rehabilitation, respectfully move for leave to cite supplemental authority, specifically the recent United States Supreme Court Opinion, rendered December 14, 2015, for consideration by this Court in the Petition for Rehearing:

DIRECTV, Inc. v. Imburgia, ___ U.S. ___, ___ S. Ct. ___ (2015), 2015 WL 8546242 (Dec. 14, 2015) (copy attached).

DIRECTV involved the California Court of Appeal's refusal to enforce an arbitration agreement pursuant to its interpretation of state law. The California Court phrased the issue as, "Does the law of California make the contract's class-arbitration waiver unenforceable?" *DIRECTV*, 2015 WL 8546242 at *3. California law previously held that class-arbitration waivers in consumer contracts were unenforceable as unconscionable. *Id.* at *3. However, in 2011, the U.S. Supreme Court held that same California rule "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" embodied in the Federal Arbitration Act. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011). Regardless, the California court in *DIRECTV* concluded *Concepcion* did not change the result, that class-arbitration waivers are still unenforceable "under California law." *DIRECTV*, 2015 WL 8546242 at *3. Thus, the Court of Appeal refused to enforce the arbitration contract. *Id.*

The *DIRECTV* Court reversed, stating:

> Lower court judges are certainly free to note their disagreement with a decision of this

> Court. But the Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source. [Citations omitted]. The Federal Arbitration Act is the law of the United States, and *Concepcion* is an authoritative interpretation of that Act. Consequently, the judges of every State must follow it. U.S. Const., Art. VI, cl. 2 ("[T]he Judges in every State shall be bound" by "the Laws of the United States").

DIRECTV, 2015 WL 8546242 at *5.

The *DIRECTV* Court summarized its focus, "we must decide not whether . . . [the state court's] decision is a correct statement of California law **but whether (assuming it is) that state law is consistent with the Federal Arbitration Act.**" *Id.* at *5 (emphasis added). Recognizing that state courts are "the ultimate authority on that [state] law," (*id.* at *5), the *DIRECTV* Court nevertheless explained its duty to "decide whether the decision of the California court places arbitration contracts 'on equal footing with all other contracts.'" *Id.* at *6 (*citing Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)):

> And in doing so, **we must examine whether the Court of Appeal's decision in fact rests upon "grounds as exist at law or in equity for the revocation of any contract."** 9 U.S.C. § 2. That is to say, we look not to grounds that the California court might

> have offered but rather to those it did in fact offer.

DIRECTV, 2015 WL 8546242 at *6 (emphasis added).

The California court's interpretation of the arbitration contract was "unique, restricted to that [arbitration] field." *Id.* at * 6. *DIRECTV* cautioned state courts against such holdings that apply or interpret state law specific to arbitration contracts:

> Third, nothing in the Court of Appeal's reasoning suggests that a California court would reach the same interpretation of "law of your state" **in any context other than arbitration**. . . . Even given our assumption that the Court of Appeal's conclusion is correct, **its conclusion appears to reflect the subject matter at issue here (arbitration), rather than a general principle that would apply to contracts** using similar language but involving state statutes invalidated by other federal law.
>
> Fourth, **the language used by the Court of Appeal focused only on arbitration.**

See DIRECTV, 2015 WL 8546242 at *6-*7 (emphasis added).

DIRECTV's reasoning may be instructive in this Petition for Rehearing. This Court evaluated the powers granted by the Clark, Whisman and Wellner POAs, specifically evaluating whether those POAs granted authority sufficient for *an arbitration contract* – which

this Court differentiated from all other contracts[1], as containing an additional "waiver of a fundamental constitutional right" to jury trial:

> Our focus has been, and remains, upon the scope of the powers expressed in the power-of-attorney document, and whether those expressed powers are sufficient to supply the principal's assent **needed to form an agreement, which on its face, forfeits those fundamental constitutional rights**.

Id. at * 15 (emphasis added).

This Court focused on whether powers expressly granted by a POA document provided sufficient authority *specifically in the context of enforcing an arbitration contract.* Even after finding the Clark POA granted sufficient authority to sign a contract, (*see id.* at * 14), the Court narrowly focused on the underlying contract's *arbitral nature*: "we also consider the extent to which the authority of an agent to waive his principal's fundamental constitutional rights to access the courts, to trial by jury, and to appeal to a higher court, can be inferred from a less-than-explicit grant of authority"). *Id.* at * 15. *DIRECTV* holds this reasoning is preempted by the FAA. *See DIRECTV*, 2015 WL 8546242 at *8.

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[1] "Infusing the authority to enter into 'any contract or agreement' with the authority to waive fundamental constitutional rights eviscerates our long line of carefully crafted jurisprudence dictating that the principal's explicit grant of authority delineated in the power-of-attorney document is the controlling factor in assessing the scope of the powers of the attorney-in-fact." 2015 WL 5634309 at *16.

Because the California court's holding did not place arbitration contracts "on equal footing with all other contracts," . . . and did not "give due regard . . . to the federal policy favoring arbitration," (citations omitted), the Supreme Court held that the FAA preempted the Court of Appeal's decision and ruled that the state court must enforce the arbitration agreement. *See DIRECTV*, 2015 WL 8546242 at *8 (*citing Perry v. Thomas*, 482 U.S. 483, 493, n. 9 (1987) (noting that the FAA preempts decisions that take their "meaning precisely from the fact that a contract to arbitrate is at issue").

The analysis employed by the U.S. Supreme Court in *DIRECTV* applies to this case and may be instructive to this Court in ruling on the Petition for Rehearing. Movants cite *DIRECTV* for this reason.

A copy of the opinion is attached for the Court's ready reference.

Respectfully submitted,

QUINTAIROS, PRIETO,
WOOD & BOYER, P.A.

/s/ Kristin M. Lomond
Donald L. Miller, II, Esq.
J. Peter Cassidy, III, Esq.
Kristin M. Lomond, Esq.
9300 Shelbyville Road, Suite 400
Louisville, Kentucky 40222
Telephone: (502) 423-6390
Facsimile: (502) 423-6391

Counsel for Movants,
Kindred Nursing Centers Limited Partnership d/b/a Winchester Centre for Health and Rehabilitation n/k/a Fountain Circle Health and Rehabilitation; Kindred Nursing Centers East, LLC; Kindred Hospitals Limited Partnership; Kindred Healthcare, Inc.; and Kindred Healthcare Operating, Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that ten (10) copies of this brief were served upon Susan Stokley Clary, Clerk, Supreme Court of Kentucky, Rm. 209, State Capitol, 700 Capitol Ave., Frankfort, KY 40601-3488, and one (1) copy served on Sam Givens, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Hon. Jean Chenault Logue, Circuit Judge, Clark County Courthouse, P.O. Box 313, Winchester, KY 40391; Robert Salyer and Richard E. Circeo, Esq., Wilkes & McHugh, P.A., 429 N. Broadway, P.O. Box 1747, Lexington, KY 40588-1747, and J.T. Gilbert, Esq., Coy, Gilbert & Gilbert, 212 N. Second St., Richmond, KY 40475 on this 15th day of December, 2015.

/s/ Kristin M. Lomond
Counsel for Movants

[Copy Of Opinion Omitted]

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ROOM 209,
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(502) 564-4720
FAX:
(502) 564-5491

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DATE: 12/16/2015

FILE NUMBER: 2013-SC-000431-I

KINDRED NURSING CENTERS LIMITED PARTNERHSHIP, D/B/A WINCHESTER CENTRE FOR HEALTH AND REHABILITATION N/K/A — APPELLANTS

V.

BEVERLY WELLNER, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF JOE P. WELLNER, DECEASED, AND ON BEHALF OF THE WRONGFUL — APPELLEES

THE DOCUMENT LISTED BELOW HAS BEEN RECEIVED AND FILED IN THIS OFFICE TODAY IN THE ABOVE CASE:

MOVANTS FILED MOTION FOR LEAVE TO CITE SUPPEMENTAL AUTHORITY.

CC:

JAMES T. GILBERT	KRISTIN M. LOMOND
JAMES PETER CASSIDY III	RICHARD ERIC CIRCEO
ROBERT EARL SALYER	
FILE COPY	

Supreme Court of Kentucky

2013-SC-000430-I

KINDRED NURSING CENTERS LIMITED PARTNERSHIP, ETC., ET AL. — MOVANTS

COURT OF APPEALS NO. 2012-CA-002113
CLARK CIRCUIT COURT NO. 10-CI-00469

JANIS E. CLARK, ETC. — RESPONDENT

AND

2013-SC-000431-I

KINDRED NURSING CENTERS LIMITED PARTNERSHIP, ETC., ET AL. — MOVANTS

COURT OF APPEALS NO. 2012-CA-002112
CLARK CIRCUIT COURT NO. 10-CI-00472

BEVERLY WELLNER, ETC. — RESPONDENT

ORDER

Movant's motion for leave to cite supplemental authority, in above-styled actions, is granted and the heretofore tendered supplemental authority is filed.

ENTERED: December 30, 2015.

/s/ John Minton
Chief Justice